No. 83-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH ADAMS, et al.,

Petitioners,

v.

TERREL H. BELL, INDIVIDUALLY, AND AS SECRETARY OF THE DEPARTMENT OF EDUCATION, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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REPLY MEMORANDUM FOR PETITIONERS

The Court will search the Government's Opposition in vain for any response, direct or

indirect, express or implied, to the central point of our petition for certiorari or (far more importantly) to the central point of Judge Wright's dissent: that the six to four ruling of the Court below* undermines the basic purpose of Title VI, the very lynchpin of the Civil Rights Act of 1964 (Pet. 36-49). Thus, unable to respond to the dissent below or to the petition for certiorari at their core, the Government is forced to rely on unsubstantiated procedural objections which we

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* The Government unsuccessfully seeks to drive a wedge between Judge Wright and the other three dissenters below (Op. 10, 11 n.6). But all four dissenters agreed on the fundamental proposition that the D.C. District Court should resolve the question whether the settlement agreement violates the Criteria and Title VI. Judge Wright simply held that that question was resolvable on the present record (Pet. App. 92a-103a), whereas Judges Wald and Mikva (Pet. App. 107a), "would leave the initial determination of the conformity of the North Carolina agreement to the Amended Criteria and Title VI to the district court" and Chief Judge Robinson left his position on this score in doubt. The difference is of no significance since the Government nowhere denies that the settlement with North Carolina violates the Criteria.

answer briefly in Point II. But, first and foremost, we emphasize for the Court in Point I exactly what our petition asserts and exactly what the Government failed to answer in its Opposition.

I.

On the eve of the 30th anniversary of the Brown decision and the 20th anniversary of the enactment of Title VI, the higher education institutions of North Carolina stand as a sorry example of the resistance of too many states of the Union to the integration of their institutions of higher learning. North Carolina has only 7.8% black students and 3% black faculty in its traditionally white institutions (Second Annual Report under the [North Carolina] Consent Decree, dated December 30, 1982, p. 34, Pet. 17, Pet App. 101a). Its traditionally black institutions remain just that--almost 90% black (Second Annual Report, supra, p. 34).

The underpinnings of segregation--the vast duplication of program offerings between neighboring traditionally white and traditionally black institutions*--continues unabated as does the manifest inferiority of programs and facilities at the black schools (see Pet. 17, Pet. App. 102a-103a). Far from wiping out the vestiges of historic segregation under law "root and branch" (Green v. County School Bd. of New Kent Co., Va., 391 U.S. 430, 438 (1968)), the ruling below permits North Carolina to defy the nation's established policy against segregation of the races. Silence is the Government's answer in its Opposition.

Title VI was enacted "to require every Federal department and agency, without exception, to act to eliminate such discrimination"

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* North Carolina has refused even to consider reduction in duplication of program offerings between neighboring white and black institutions (Pet. 17, Pet. App. 93a-94a, 102a).

on the part of recipients of Federal funds (110 Cong. Rec. 6546 (1964)(remarks of Sen. Humphrey)). Congress was providing a "wholesale" method for enforcing the Constitution in lieu of "retail" individual suits against segregating recipients of Federal funds (Pet. 36-42 and citations therein). At the time Title VI was enacted (1964), the law was already perfectly clear that individual suits would lie against segregated recipients of Federal funds. As far back as 1958 this Court had left no doubt that Government "funds or property" could not constitutionally be utilized in support of segregated schools (Cooper v. Aaron, 358 U.S. 1, 19), and any injured person could bring suit under 28 U.S.C. §1331 to enforce this Constitutional principle against the recipients of Federal funds. Nowhere does the Government challenge that the true purpose of Title VI was to require the funding Federal agency to eliminate discrimination

wholesale, a purpose vindicated by holding the agency judicially accountable for default of its statutory duty. To confine injured parties solely to individual suits against federal fund recipients would undermine the purpose of Title VI.

By 1981, after 11 years of diligent work in this case, this litigation was in a posture to bring about wholesale agency enforcement of civil rights in the area of higher education. The D.C. courts had ordered the issuance of Criteria to bring about desegregation of higher education institutions and the Federal agency involved had issued those Criteria in response thereto (Pet. 9-12). But the new Secretary of Education abandoned those Criteria in 1981 as part of his avowal that the "obligation to enforce" Title VI "is against my own philosophy" (Pet. 16 n.4). Instead of enforcing Title VI through the Criteria issued earlier by his Department, Secretary Bell

entered into an agreement with the North Carolina authorities, an agreement kept secret from the petitioners until after it was consummated, which violated the Criteria in almost every important respect (Pet. 15-18, Pet. App. 92a-103a). The Court will look in vain for any response in the Government's Opposition to petitioners' or Judge Wright's demonstration that the agreement violates the Criteria and Title VI or even any denial that the Criteria have been abandoned.

The Criteria which this litigation forced out of the Government are today in limbo and the desegregation process in higher education is back at its hit-and-miss stage. Instead of recognizing petitioners' right to enforce the Criteria they have won in the Court where they won them, the Government now offers petitioners a Hobson's choice of forums: intervene in the suit brought by the State of North Carolina in North Carolina or bring a new

suit against the fund recipient there (Op. 15-16). But after 13 years of efforts to ensure Title VI enforcement by HEW and the Department of Education, we decline that offer. Certainly the Judge who ordered the issuance of the Criteria should be the one to decide whether they have been abandoned and to take the appropriate action to reverse that abandonment.

This suit was almost a decade old before attorneys for North Carolina higher education authorities dreamed up the idea of an end run around the Criteria and the courts of the District of Columbia which had ordered them. It would be crazy-quilt litigation indeed to require petitioners to leave the forum in which the funding agency is located and in which petitioners litigated for years to wrest from the agency the desegregation Criteria at the heart of this case, only to force them to repair to the forum carefully shopped by the

segregated fund recipient.* The Government's suggestion that intervention in North

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* The impact of the loophole carved out below is well illustrated by the proceedings in the North Carolina District Court. When petitioners' counsel sought to argue orally as amicus curiae for the transfer of the North Carolina suit to the District of Columbia in 1979, Judge Dupree refused to allow him to make that argument. When petitioners' counsel learned on July 7, 1981 that the Consent Decree was to be presented to Judge Dupree on Monday, July 13, 1981, Mr. Rauh telephoned Judge Dupree and requested time after the 13th to file petitioners' opposition, pointing out to the Court that the Government and North Carolina had never given any reason why the Court is called upon to, or properly can, approve the settlement (Plts-Appls.' App. below 145, n.1). Counsel further pointed out to Judge Dupree that the motion and memorandum of the Government arguing for the approval of the Court would only be made available to them in Washington on Monday, July 13th, the very day counsel was directed by the Court to file our memorandum in North Carolina (ibid.). Judge Dupree refused any extension saying he had to be out of town on Tuesday and Wednesday and wanted to render a decision that week. Petitioners were thus required to file their opposition without having the slightest idea on what predicates the Government and the State of North Carolina would call upon Judge Dupree for this unprecedented action.

Most importantly, Judge Dupree's statements in his opinion, issued Friday, July 17,

Carolina was the proper course also fails because, as the dissenting judges make clear, "all justiciable issues in that controversy [in the North Carolina Court] had already been decided" (Pet. 33-35).*

As far as the other half of the Hobson's choice offered us, namely, that petitioners sue the recipients of Federal funds in a new suit in North Carolina, we have already

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1981, that the settlement decree comported with the Criteria and that it was "'fair, reasonable and adequate'" (Op. 8) had no basis whatever. Neither the Federal Government nor the State argued to the North Carolina judge that the settlement agreement met the Criteria, and the Judge had no time in the intervening three days between filing and decision (two of which he was apparently out of town) to review the 15,000-page administrative transcript and the 500 exhibits and make a meaningful determination on conformance with the Criteria or on the fairness, reasonableness, and adequacy of the agreement (Pet. 20, n.6).

* The Government's argument (Op. 15, 16, n.10) that the North Carolina court had jurisdiction of the subject matter and the parties fails significantly to answer the dissenting judges' demonstration that there was no case or controversy there (Pet. App. 85a-89a).

demonstrated that this requirement would undermine the purpose of Title VI (pp. 4-6, supra). A remedy that existed before Title VI was enacted could hardly be the remedy intended by Title VI. The Government offers these alternatives to the long-existing suit against the agency without any consideration of the damage thus done to the enforcement of civil rights in the area of higher education.

In support of its argument that petitioners should sue the recipients of Federal funds rather than the Federal agency involved, the Government (Op. 19, n.12) relies upon an observation in Cannon v. University of Chicago, 441 U.S. 677, 707, n.41 (1979) that a suit against the agency has more of a "disruptive" effect than a suit against the recipients. But the Court made this comment in the context of the right of an individual to sue, and the Government's use of that comment in a suit to

compel a Federal agency to carry out its enforcement obligation can only be mis nievous. Certainly this Court was aware that the right of an individual to sue the segregated recipient preceded Title VI, and this Court's comment was hardly intended to throw doubt upon the basic purpose of Title VI to create a duty on the Federal agency dispensing the funds to ensure their non-discriminatory use or upon a right of review of the failure to implement that duty. No doubt this Court, if it grants certiorari as we urge, will clarify this observation relied upon by the Government, as well as point the way to the decades-delayed integration of the nation's higher education institutions.

We turn now to demonstrate that the sundry procedural objections set up by the Government--instead of answering this Point I--in no way warrant the result below.

II

1. The Government (Op. 12-13) states that "The sole ground on which petitioners sought an injunction in district court was that the then-proposed settlement of the dispute with North Carolina violated the April 1, 1977 order entered in the Adams litigation.... The district court denied relief because of its conclusion that its previous order did not cover the present situation." The Government is in error. At the oral argument on the motions for temporary restraining order and preliminary injunction, Judge Pratt stated to petitioners' counsel, "I would like you to confine yourself to the matter of our jurisdiction....That is what we have to decide before we get into any matter of comparing the plan that North Carolina has submitted against the criteria and guidelines that the government previously formulated" (emphasis

added)(Plts-Appls' App. below, 23). The Court then proceeded to deny the motions, not because the Government had not violated the Court's Order, but because "we would wholly lack jurisdiction" (Pet. App. 117a). But, as the dissent makes crystal clear (Pet. App. 42a-43a, 56a), there was ample jurisdiction in the District Court to enforce its decree rather than to frustrate a decade of litigation.

2. The Government contends that Title VI affords a right of judicial review of funding agency action only to aid recipients, not to the victims of the federal funding of racial discrimination. But Section 603 expressly provides that "Any department or agency action taken pursuant to section 2000d-1 [Section 602] of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." Thus APA

review, for reasons explained in full by the dissenting judges below (Pet. App. 45a-47a; also 48a-49a, 55a-57a), is clearly available to victims of discrimination, such as petitioners. Congress could hardly have intended, sub silentio, to give the discriminator a remedy while denying it to the victim of discrimination.*

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* The Government argues (Op. 18) that because another sentence of Section 603 explicitly confers an APA right of review where Federal aid has been denied, APA review is only available in that circumstance. But there is no reason in either language or legislative history for this illogical assumption. Had Congress intended to limit review of funding agency action--or inaction--to fund recipients, it could readily have said so. Moreover, the legislative history of Section 603 cited by the Government, after stating a purpose to specify APA review availability for fund denial against any claim of unreviewable agency discretion, goes on to state that "It is not the purpose of this provision of section 603, however, otherwise to alter the scope of judicial review as presently provided in section 10(e) of the Administrative Procedure Act" (H.R. Rep. 914, 88th Cong., 1st Sess. 25-26 (1963)(emphasis added).

(footnote continued)

3. Finally, the Government suggests that "the Adams plaintiffs did not include any citizens of North Carolina" and "the Adams litigation never has been a class action..." (Op. 12, n.7). But the Government withholds from the Court the most relevant facts in this connection: (i) that this case was brought as a class action and for 13 years has been treated as one by Judge Pratt, who concluded in his initial ruling that "plaintiffs have standing to bring this action on behalf of themselves and others similarly situated," 351 F.Supp. 636, 640 (1972),* and (ii) in

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The Government's citations are as unpersuasive as their logic. The citation of remarks of Senator Pastore (Op. 18) is inapposite, for he was merely listing the rights of fund recipients, not negating them for others. And Gardner v. Alabama, 385 F.2d 804, 810-11 (5th Cir. 1967) (Op. 18) deals only with the locus of judicial review as in the court of appeals or the distrit court, not anyone's right to invoke review.

* See Graves v. Walton County Board of Education, 686 F.2d 1135 (11th Cir. 1982).

1982 twenty-two members of the class who attend elementary, secondary and higher education, including black college students in North Carolina, were added to the case (Order of the District Court, filed Nov. 16, 1982).

CONCLUSION

An entire generation of young men and women have been relegated to segregated facilities of higher education which this Court outlawed in Brown 30 years ago and which Congress sought to remedy 20 years ago by the enactment of Title VI. We ask this Court to grant certiorari to ensure that another generation will not suffer the same fate. Possibly this Court will want to consider, in the interest of breaking this intolerable impasse, directing the Clerk to expedite briefing

schedules and advance this case for oral argument at this term of Court.

Respectfully submitted,

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